



UNIVERSITY OF
TORONTO
FACULTY OF LAW



Reproductive and Sexual Health Law Supplement

Rebecca Cook & Joanna Erdman
Faculty of Law, University of Toronto

Fall 2010

*These materials have been prepared exclusively for the use of students of the
Faculty of Law, University of Toronto*

BORA LASKIN LAW LIBRARY

AUG 17 2010

FACULTY OF LAW
UNIVERSITY OF TORONTO

Reproductive and Sexual Health Law Supplement

Rebecca Cook & Joanna Erdman
Faculty of Law, University of Toronto

Fall 2010

*These materials have been prepared exclusively for the use of students of the
Faculty of Law, University of Toronto*



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/reproductivesexu00cook_2

Reproductive and Sexual Health Law

2010 Supplement

Rebecca Cook & Joanna Erdman
Faculty of Law, University of Toronto

This course addresses national and international legal protection and promotion of reproductive and sexual health. It examines the comprehensive nature of reproductive health, including fertility control and promotion, treatment of sexually transmitted diseases, such as HIV/AIDS, and sexual violence. The course provides introductory overviews of the background law. The course surveys different disciplinary dimensions, such as biomedical, epidemiological and social science perspectives that can be used in the development and application of reproductive and sexual laws. It analyzes the effectiveness of the law in protecting groups at high risk of reproductive health disadvantages, such as adolescents.

Contact Information:

Rebecca Cook
Falconer Rm 210
rebecca.cook@utoronto.ca

Joanna Erdman
Library Rm 3027
joanna.erdman@utoronto.ca

Office hours available by appointment

International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
<http://www.law.utoronto.ca/programs/reprohealth.html>

Listserv: <http://www.law.utoronto.ca/documents/reprohealth/howtojoinlistserv.pdf>

Texts:

Cook RJ, Dickens BM and Fathalla MF. *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*. Oxford: Oxford University Press, 2003.

Updates available at: <http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html>

2009 Supplement

Structure:

Part 1: Context and Perspectives (September 15, 22, 24)

Part 2: The Regulation of Reproductive and Sexual Health Care (September 29, October 6, 13)

Part 3: Equality and Non-Discrimination (October 20, 27)

Part 4: Access to Information (November 10)

Part 5: Dignity, Bodily Integrity and Liberty (November 17, 24, December 1)

Evaluation:

80% Written Work: four short papers or SUYRP

20% Class Participation: regular attendance, reflective input into class discussion, on-call days

80% written work in the form of four short papers (1,563-1,875 words each, which is about 6-7 pages at about 250 words a page) analyzing the reading materials assigned for class and handed in by * **12pm on the Monday** * prior to the class in which the materials are to be discussed. Short papers should be placed **under the office door** of the professor responsible for the class. Permission for electronic submission will be given only in exceptional circumstances.

A limited number of students may arrange with Professor Cook to complete a **Supervised Upper Year Research Paper ("SUYRP")** in the course. If a student completes the SUYRP, that paper will constitute 80% of the grade and will replace the four short papers. Please see *Academic Handbook: Supervised Upper Year Research Paper ("SUYRP")* for further requirements.

The schedule for the SUYRP is as follows:

- October 20: Outline and bibliography due
- October 27: Outline and bibliography returned with comments
- November 17: First draft due
- November 24: First draft returned with comments
- December 20, 10:00am: Deadline for written work, final paper due at records office

Please see Writing Guide for further information on evaluation of written work. The University of Toronto provides a number of writing resources: www.utoronto.ca/writing.

All students will be evaluated on 20% class participation, which will be measured by regular attendance with reflective input into class discussion, including on-call days when students will discuss their short papers, or if completing the SUYRP, will introduce one of the reading materials assigned for the class. SUYRP students must sign up for on-call days the week prior to the class in which the materials are to be discussed.

Email Policy:

Email will not be used as an alternative to meeting with the course instructors before or after class or by appointment. Email inquiries will be responded to only in exceptional circumstances. Please ensure you consult the syllabus and other course materials before submitting any email inquiry. All email messages must include in the subject line the course identifier and a concise and clear statement of purpose [e.g. RSH Law Seminar: short paper]. Inquiries of interest to all students will be addressed in class.

Reproductive and Sexual Health Law: Course Overview

First Term: 3 credits; 2 hours

Schedule: Wednesday, 4:10 – 6:00pm

SUYRP/ Perspective Course

Part 1: Context and Perspectives

1. September 15: Introduction and Course Overview (Cook/Erdman)
2. September 22: The Empirical in RSH Law and Policy (Cook)
3. September 24: Perspectives in RSH Law (Cook) ** RESCHEDULED CLASS **

Part 2: The Regulation of Reproductive and Sexual Health Care

4. September 29: Criminal Regulation (Cook)
5. October 6: Service Delivery Regulation (Erdman)
6. October 13: Regulation of Service Accessibility (Erdman)

Part 3: Equality and Non-Discrimination

7. October 20: Stereotyping as Discrimination: Sex/Gender (Cook)
8. October 27: Stigmatization as Discrimination: Health Status (Erdman)

Part 4: Access to Information

9. November 10: Information (Erdman)

Part 5: Dignity, Bodily Integrity and Liberty

10. November 17: Bodily Integrity: Sterilization (Cook)
11. November 24: Torture and Other Inhuman and Degrading Treatment: Forced Pregnancy and Intimate Body Searches (Erdman)
12. December 1: Sexual Violence, Vulnerability and Empowerment (Erdman)

PART 1: CONTEXT AND PERSPECTIVES

1. September 15: Introduction and Course Overview (Cook/Erdman)

The texts for the course are:

R.J. Cook, B.M. Dickens & M.F. Fathalla. *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*. Oxford: Oxford University Press, 2003 (Green Book, GB).

Updates: <http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html>

2009 Supplement

Writing Guide

2. September 22: The Empirical in RSH Law and Policy (Cook)

Green Book: 8-33, 154-156, 95-107, 225-228, Part III 406-427. GB

D. Maine et al. "Risk, Reproduction and Rights: The Uses of Reproductive Health Data" in R. Cassen (ed.) *Population and Development: Old Debates, New Conclusions* (Washington: Overseas Development Council, 1994), 203-227. 1

SJ. Jejeebhoy. "The Importance of Social Science Research in Protecting Adolescents' Sexual and Reproductive Choice." (1999) 18 *Medicine and Law* 255-272. 14

3. September 24: Perspectives in RSH Law (Cook)

A. Critical Perspectives on Sexuality, Gender and Race

Green Book: 14-18 (review). GB

G.W. Dowsett. "Some considerations on sexuality and gender in the context of AIDS" (2003) 11(22) *Reproductive Health Matters* 21-29. 24

D. Roberts. "Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy" (1991) 104 *Harvard Law Review* 1419-1482 (excerpt: pp. 1419-1428, 1436-1444). 33

B. Human Rights and Public Health Perspectives

Green Book: 90-92, 148-158, 217-230, 248-252. GB

J. Cohen, N. Kass & C. Beyrer. "Responding to the Global HIV/AIDS Pandemic: Perspectives from Human Rights and Public Health Ethics" in C. Beyrer and H.F. Pizer (eds.) *Public Health and Human Rights: Evidence-Based Approaches* (Baltimore: JHU Press, 2007), 362-390. 52

PART 2: THE REGULATION OF REPRODUCTIVE & SEXUAL HEALTH CARE

4. September 29: Criminal Regulation (Cook)

A. General Principles

Green Book: 144-47, 236-238. GB

B. The Unborn Child and the Criminal Law

J. Cook & S. Bewley. "Acknowledging a persistent truth: domestic violence in pregnancy" (2008) 101 *Journal of the Royal Society of Medicine* 358-363. 68

Bill C-484, *An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offence)*, 2d Sess., 39th Parl., 2007 (1st reading, 21 November 2007). 74

Vo v. France (2005) 40 EHRR 12 (European Court H.R.). Grand Chamber, 8 July 2004. 77

See also: Child Protection Measures

Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925.

D. v. Berkshire County Council, [1987] 1 All ER 20.

C. HIV/AIDS Transmission

L. Gostin. *The AIDS Pandemic: Complacency, Injustice and Unfulfilled Expectations* (Chapel Hill: University of North Carolina Press, 2004), 186-187, 195-198. 85

M. Weait. "Criminal Law and the Sexual Transmission of HIV: *R. v. Dica*" (2005) 68 *Modern Law Review* 121-139. 88
A Comment on: *R. v. Dica* [2004] EWCA Crim1103.

R. v. Konzani [2005] EWCA Crim 706. 102

Contrast <i>R v. Cuerrier</i> (1998) 127 C.C.C. (3d) 1 (S.C.C.).	105
with <i>R v. Cuerrier</i> (1996) 141 D.L.R. (4th) 503 (British Columbia).	

5. October 6: Service Delivery Regulation (Erdman)

A. General Principles

Green Book: 49-51, 128-135.	GB
-----------------------------	----

B. Duty of Care: Condoms in Prisons

“United Kingdom: Provision of condoms to prisoners” <i>Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV</i> (Geneva: Can HIV/AIDS Legal Network & UNAIDS, 2006), 106-108.	118
---	-----

<i>R. v. Secretary of State for the Home Department ex parte Glen Fielding</i> [1999] EWHC Admin 641 (High Court of Justice, Queen’s Bench).	121
---	-----

C. Service Provider Regulation: Emergency Contraception & Abortion

<i>Royal College of Nursing of the UK v. Department of Health and Social Security</i> , [1981] 1 All ER 545 (House of Lords).	125
---	-----

R.J. Cook, B.M. Dickens & J.N. Erdman, “Emergency contraception, abortion and evidence-based law” (2006) 93 <i>International Journal of Gynecology and Obstetrics</i> 191-197 (excerpt: pp. 191-194).	130
---	-----

<i>Smeaton v Secretary of State for Health</i> , [2002] EWHC 610 (Admin).	137
---	-----

6. October 13: Regulation of Service Accessibility (Erdman)

A. General Principles

Green Book: 187-194	GB
---------------------	----

Reference: Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health* (Article 12): GB 469-477.

Reference: Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health* (Article 12): GB 477-499.

A. Access to Legal Abortion

- R.J. Cook & S. Howard. “Accommodating Women’s Differences under the Women’s Anti-Discrimination Convention” (2007) 56 *Emory Law Journal* 1039-1091 (excerpt: pp. 1055-1070). 153
- R.J. Cook, B.M. Dickens & J.N. Erdman, “Emergency contraception, abortion and evidence-based law” (2006) 93 *International Journal of Gynecology and Obstetrics* 191-197 (excerpt: pp. 194-196). 130
- Family Planning Association of Northern Ireland v Minister For Health Social Services and Public Safety*, [2004] NICA 39 (Court of Appeal). 161
- Tysiac v. Poland*, App. No. 5410/03 (2007) (European Court H.R.). 171
- R v. Morgentaler*, [1988] 1 S.C.R. 30. 182
- Reference: Access to Abortion Reports: An Annotated Bibliography.
A collection of reports and secondary literature that investigate women’s access to lawful abortion.
<http://www.law.utoronto.ca/documents/reprohealth/abortionbib.pdf>

B. Access to Essential Medicines and Maternal Health

- Green Book: 185-186, 160-164, 194-196. GB
- M. Potts & A. Hemmerling. “The worldwide burden of postpartum haemorrhage: Policy development where inaction is lethal.” (2006) 94 *International Journal of Gynecology and Obstetrics* S116-S121. 186
- A.D. Weeks, C. Fiala & P. Safar. “Misoprostol and the debate over off-label drug use.” (2005) 112 *BJOG: International Journal of Obstetrics and Gynaecology* 269-272. 192
- D.O.E. Gebhardt. “Misoprostol in a topsyturvy world” (2001) 27 *Journal of Medical Ethics* 205. 196
- World Health Organization. Misoprostol as an Essential Medicine. Excerpts from Technical Report Series: The Selection and Use of Essential Medicines (2003, 2009). 197

PART 3: EQUALITY AND NON-DISCRIMINATION

7. October 20: Stereotyping as Discrimination: Sex/Gender (Cook)

A. General Principles

Green Book: 196-209; 469-477 (CEDAW Gen Rec. 24). GB

Convention on the Elimination of All Forms of Discrimination against Women, arts. 2(f), 5(a) and 12. 200

B. Gender Stereotyping and Abortion

Gonzales v. Carhart, 550 U.S. ____ (2007); 127 S.Ct. 1610. Excerpt: 203
Syllabus; per Kennedy (majority) at 1634-1635; per Ginsburg (dissenting) at 1647-1649 (United States, Supreme Court)

R.B. Siegel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions" (2007) 3 *University of Illinois Law Review* 991-1053 (excerpt: pp. 994-997, 1009-1014, 1029-1050). 211

R.J. Cook & S. Howard. "Accommodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56 *Emory Law Journal* 1039-1091 (excerpt: pp. 1039-1051). 243

C. Gender Stereotyping and Conscientious Objection

Green Book: 139-142. GB

R.J. Cook, M. Arango Olaya & B.M. Dickens. "Healthcare responsibilities and conscientious objection" (2009) 104 *International Journal of Gynecology and Obstetrics* 249-252. 255

C. Smearman. "Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists" (2006) 48 *Arizona Law Review* 469-540 (excerpt: pp. 492-507). 259

Pichon and Sajous v. France, App. No. 49853/99 (2001) (European Court H.R.). 275

8. October 27: Stigmatization as Discrimination: Health Status (Erdman)

A. General Principles

G.T. Keusch, J. Wilentz & A. Kleinman. “Stigma and global health: developing a research agenda” (2006) 367 *The Lancet* 525-527. 278

B.G. Link & J. Phelan. “Stigma and its public health implications” (2006) 367 *The Lancet* 528-529.

S. Burris. “Stigma and the law” (2006) 367 *The Lancet* 529-531.

B. Infertility

Green Book: 16-17, 30, 305-314. GB

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S. COA). 285

Evans v United Kingdom (2006) 43 EHRR 21 (European Court H.R.). 299
See also: Evans v. Amicus Healthcare Ltd. [2004] E.W.C.A Civ. 727

C. HIV/AIDS

“India: Supreme Court denies right to marry for people living with HIV, then resiles from this conclusion” *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*. (Geneva: Canadian HIV/AIDS Legal Network and UNAIDS, 2006), 21-26. 308

Mr. X v. Hospital Z, (1998) 8 SCC 296 varied 2002 (SC India). 314

PART 4: ACCESS TO INFORMATION

9. November 10: Information (Erdman)

A. General Principles

Green Book: 109-113, 209-211 GB

B. The Right to Seek, Receive and Impart Information

Open Door Counselling and Dublin Well Woman v. Ireland (1992), 15 EHRR 244 (European Court H.R.) 316

Bigelow v. Virginia, 421 U.S. 809 (1975). 327

<i>Women on Waves and Others v Portugal</i> , App. No. 31276/05 (2009) (European Court H.R.) (Registrar Press Release)	342
---	-----

C. Information as Harm Reduction

Jessica Cohen et al. “Reaching Women with Instructions on Misoprostol Use in a Latin American Country” (2005) 13(26) <i>Reproductive Health Matters</i> 84–92.	344
--	-----

L. Briozzo et al. “A risk reduction strategy to prevent maternal deaths associated with unsafe abortion.” (2006) 95(2) <i>International Journal of Gynecology and Obstetrics</i> 221-226.	353
---	-----

PART 5: DIGNITY, BODILY INTEGRITY AND LIBERTY

10. November 17: Bodily Integrity: Sterilization (Cook)

A. General Principles

Green Book: 109-115.	GB
----------------------	----

B. Sterilization: Consent & Coercion

Green Book: 128-134 (Review), 238-240, 315-322.	GB
---	----

<i>Zimmer v. Ringrose</i> (1981), 124 D.L.R. (3rd.) 215.	359
--	-----

<i>A.S. v. Hungary</i> (UN CEDAW; Hungary, Aug. 2006).	364
--	-----

C. Sterilization: Parens Patriae & Best Interests

Green Book: 118-119.	GB
----------------------	----

<i>Re Eve</i> (1986) 31 D.L.R. (4th) 1 (S.C.C.).	372
--	-----

C.M. Olesen, “Eve and the Forbidden Fruit: Reflections on a Feminist Methodology” (1994) 3 <i>Dalhousie J. of Legal Studies</i> 231-240.	378
--	-----

11. November 24: Torture and Other Inhuman and Degrading Treatment: Forced Pregnancy and Intimate Body Searches (Erdman)

A. General Principles

Green Book: 170-175. GB

B. Forced Pregnancy

Green Book: 352 (Last Paragraph) GB

K.L. v. Peru, Comm. No. 1153/2003: Peru. 22/11/2005, U.N. Doc. CCPR/C/85/D/1153/2003 (2005). 383

C. Intimate Body Searches

Green Book: 298-304.

S. Long. "When doctors torture: the anus and the state in Egypt and beyond" (2004) 7(2) *Health and Human Rights* 114-140. 390

F. Scorgie, "Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention" (2002) 61(1) *African Studies* 55-75. 404

12. December 1: Sexual Violence, Vulnerability and Empowerment (Erdman)

A. Sexual Violence and Post-Exposure Prophylaxis (PEP)

Green Book: 287-297. GB

A. Miller. "Sexuality, violence against women, and human rights: women make demands and ladies get protection" (2004) 7(2) *Health and Human Rights* 16-47. 415

M. Richter. "Pepping up the public healthcare system for rape survivors: AIDS activism and advocacy" (2004) 60 *Agenda* 47-54. 431

B. Empowerment in the Female Condom

A. Kaler, " 'It's some kind of women's empowerment': the ambiguity of the female condom as a marker of female empowerment" (2001) 52 *Social Science and Medicine* 783-796. 436

WRITING GUIDE: REPRODUCTIVE AND SEXUAL HEALTH LAW

Requirements:

- **Four Short Papers** analyzing reading materials from any **Four Seminar Parts**
- Length: 1,563-1,875 words each, which is about 6-7 pages at about 250 words a page
- Submission:
 - By 12pm on Monday prior to the class in which the materials are to be discussed.
 - Under office door of professor responsible for the class.
 - Rebecca Cook: Falconer Rm 210; Joanna Erdman: Library Rm 3027.
 - Permission for electronic submission given only in exceptional circumstances.
- Short papers will be used in class to guide discussion of the materials. Students will be on-call and required to discuss their short papers.
- Graded short papers will be returned after class with comments.

Objective: Active Reflection and Critical Engagement

Short papers should actively reflect on and critically engage with an assigned reading (or any part of the reading). This may include a section from the Green Book, a case or an article. Do not summarize or describe the reading. Analyze the reading. Additional research is not required.

Short papers may:

- Question and reflect on the meaning and uses of language or concepts
- Examine how the reading reinforces or challenges hierarchies, constructions and relations in law and legal practice; how the reading positions reproductive and sexual health processes or functions, behavior or services in legal regulation
- Investigate the assumptions, values and interests (related to, for example, gender, race and ethnicity, or sexual orientation) underlying a position or argument
- Articulate conflicts, contradictions or uncertainties in the reading
- Compare and contrast interpretations or analytical methods with those in other readings
- Problematize the assumptions or analytic framework of the reading
- Apply the reading to a different context (e.g. geographical, social, political, clinical or health system) or critique the reading from a different perspective or within an alternative discourse (e.g. critical, feminist, development, economic, human rights, public health)

Assessment Criteria:

Short papers will be assessed on: analysis, structure, and style.

- **Analysis:** Clearly state at the outset, your thesis or argument. What is of utmost interest is not your conclusion, but your reasons for drawing your conclusion. You must back up all assertions with reasons.

While it may be helpful to introduce the reading in your paper, your paper must go beyond description. You **MUST** analyze the reading and draw conclusions from your analysis.

Be certain to canvas alternative positions and arguments in the course of your paper and to rebut these to the extent that they are inconsistent with your arguments.

Use examples to illustrate your arguments. These may be cases, events, or hypothetical examples, where appropriate.

Some degree of originality is important. You are expected to develop your own thoughts and analysis, and not describe the thoughts and analysis of others.

- **Structure:** Structure is essential to a clear and well-argued paper. You should include an introduction and a conclusion. You should outline your structure in your introduction.

Arguments should be clear and logical and ideas should be linked coherently. Sub-headings are useful in delineating structure and moving from one idea or argument to the next.

Each paragraph should have something relevant to say about your thesis or argument. If it does not, ask yourself or try to explain why you have included that paragraph.

- **Style:** Clear expression, good presentation, accurate grammar and spelling, and appropriate use of vocabulary are essential.

Citations and Referencing:

For the accepted legal citation style at the University of Toronto Faculty of Law, see the *Canadian Guide to Uniform Legal Citation* (referred to as the “McGill Guide”) or the Bora Laskin Law Library website.

All use of others’ language **MUST** be indicated in quotation marks and referenced. Use of others’ ideas should be fully referenced. Failure duly to acknowledge the work of others constitutes plagiarism and is a serious academic offence.

Additional writing resources are available: www.utoronto.ca/writing.

